

1921392 (Migration) [2023] AATA 3929 (20 October 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REPRESENTATIVE:	Dr Ngo Tung Bao (MARN: 0006620)
CASE NUMBER:	1921392
MEMBER:	David Crawshay
DATE:	20 October 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 20 October 2023 at 8:46am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – remarriage after previous divorce – two adult children – financial aspects – little evidence for integration of finances – nature of the household – living under the same roof with son and daughter-in-law – social aspects – little evidence from outside of the parties’ families – nature of the commitment – lack of detailed evidence regarding the development of the parties’ relationship – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 820.211

CASES

He v MIBP [2017] FCAFC 206

MILGEA v Dhillon [1990] FCA 144

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 1 August 2019 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (Cth) (the Act).
3. The applicant applied for the visa on 24 January 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied that the applicant was the spouse of the sponsor at the time of application. The applicant provided a copy of the delegate's decision. The applicant and sponsor will hereby be collectively referred to as "the parties" unless otherwise indicated.
5. The applicant appeared before the Tribunal on 12 September 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant was the spouse of the sponsor at the time of application and whether she continues to be his spouse at the time of this decision.

Background

9. A short background is necessary to understand the parties' previous relationship history.
10. According to the delegate's decision, the parties first met in November 1992 and were married thereafter. They had two children before they divorced – [Mr A], born in 1994; and [Mr B], born in 1997.
11. After the parties divorced, the sponsor married a woman called [Ms C] in September 2007, but the two divorced in July 2014. During this period, the applicant applied for a partner visa in January 2010 and this visa was granted in June 2010 according to Department movement records.
12. According to the application form dated 24 January 2017, after the sponsor's divorce the parties reunited in Vietnam and spent time travelling with each other. When the sponsor returned to Australia, the applicant claimed that they spoke a lot on the telephone and realised that they had feelings for each other. The applicant claimed that they decided to get back together with the support of their two children.

13. The applicant was granted a Prospective Marriage visa in November 2016 and travelled to Australia [in] December 2016. The parties remarried [in] January 2017 and the visa application was lodged on 24 January 2017.

Whether the parties are in a spouse or de facto relationship

14. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
15. "Spouse" is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal has sighted a certificate for a marriage that took place on 6 January 2017. The certificate stated that the marriage was solemnised in accordance with the *Marriage Act 1961*. The Tribunal accepts that the certificate is genuine and that the parties are free to marry each other. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

17. Based on the information in front of it, the Tribunal makes the following findings. It finds that the parties do not have any joint ownership of real estate or other major assets, nor do they have any joint liabilities. These aspects are given no weight.
18. In terms of the extent of any pooling of financial resources and the basis of any sharing of day-to-day household expenses, the applicant has provided four statements from a [Bank 1] account for four different three-month periods in 2020, 2021, 2022 and 2023. A letter from [Bank 1] dated 10 November 2020 stated that this account opened on 24 August 2020. These statements show various transactions such as payments for rent, groceries, clothing and insurance. Income is mainly received from an account ending in xx0702 (which likely belongs to the applicant given that her salary is paid into an account ending in "xx702" according to payslips) and from the parties' sons. Payslips from both parties (the sponsor for periods in 2020 and the applicant for periods in 2022) showed their salaries directed into accounts that did not correspond with the joint account.
19. In a submissions letter dated 8 April 2023, the applicant's representative wrote as follows:

On top of the cash the couple has spent together for eating out, shopping and entertaining, they have opened a joint account with [Bank 1] for their incomes and expenses.

...

The bank statements ... show the account has been actively operated for their day-to-day expenses for shopping, payments of food, utility bills, petrol, medicine and rentals.

20. At hearing, the applicant said that before the joint account opened in August 2020, the sponsor would pay rent along with their two sons. She said that she was taking care of house chores at that time as well as going shopping for groceries. The applicant said that she started working after the COVID-19 pandemic and did a little bit of work before that. She said that she does not know how to deposit money, so she gives the money to her sons to deposit.
21. The applicant said that she did not work a lot and did not have an income, so they relied on the sponsor's personal account to pay for things. She said that after the refusal, the parties decided to open a joint account, although she admitted that the parties use their personal accounts and rarely use the joint account. She said that she would use the joint account more often. She said that the parties would pay rent by transferring money from their joint account into the older son's account. She said that when she went to the bank and asked for statements they were told that the account was closed due to inactivity.
22. The Tribunal has considered the information in front of it including the above information. It finds that the parties opened a joint account in August 2020 which by the applicant's own admission was motivated by the visa refusal. Again, by the applicant's own admission, it finds that this account was rarely used when compared to their personal accounts. Based on the statements themselves and the parties' payslips, the Tribunal finds that they did not direct their salaries into the joint account but instead the applicant relied on transfers from the parties' sons and from an account ending in x0702 which it reasonably believes belongs to her. Although there is evidence to show rental payments being made (either directly or indirectly), these payments would benefit the applicant and the parties' children as well as the sponsor.
23. Furthermore, although the Tribunal notes the claims made by the applicant at hearing and the submissions of her representative in his pre-hearing letter dated 8 April 2023 about the parties' financial arrangements before the opening of the joint account, it has no documentary information to substantiate these claims. While it may be difficult to show cash payments being made, for example, this could have been achieved by providing bank statements from the parties' personal accounts which show cash withdrawals being made before transactions.
24. Lastly, no information has been received that sheds light on the parties' financial arrangements after 5 January 2023 (which is the last date on the parties' joint bank account statement).
25. The Tribunal places very little weight on information which purports to show that the parties have pooled their financial resources and shared day-to-day household expenses.
26. In terms of whether the parties owe any legal obligations in respect of the other, the Tribunal has received no information. No weight is accorded to this aspect.

27. Having considered the information in front of it, including the above information, the Tribunal is not satisfied that the financial aspects of the parties' relationship point to them being in a genuine and continuing relationship at the time of application or at the time of this decision.

Nature of the household

28. In terms of whether the parties have any joint responsibility for the care and support of children, they have two adult-aged children who had already turned 18 at the time of application. Based on a Form 888 completed in April 2023, the Tribunal accepts that the parties' younger child, [Mr B], lives at an address in [Suburb 1] along with the parties. Based on the submissions letter from the applicant's representative, it accepts that their older child lives with them there as well as their daughter-in-law. In addition, the sponsor has another child by his ex-spouse, although the applicant's evidence at hearing was that this child has moved away with his mother and the applicant has never met him.
29. The Tribunal accepts that the parties likely provide care and support to their two children, although in the absence of other more compelling evidence as to the genuineness of the parties' relationship and their mutual commitment to each other, this aspect is given diminished weight as there is an obvious pre-existing familial relationship between the parties and these children.
30. Turning to the parties' living arrangements, the Tribunal accepts based on a tenancy agreement and on a document showing rental payments, and on correspondence addressed to one or both parties, that they had been living under the same roof at the [Suburb 1] address during 2018, 2019, 2020 and 2021. Furthermore, and given that they have two children who still live at home, it accepts that they have been living under the same roof before and after these dates. However, it is not satisfied based on this information alone that they were doing so as members of a married relationship as there are other possibilities that stem from the evidence. The most plausible of these is that they live together as parents of their children who had been living with them during this period. This aspect is therefore given little weight.
31. Lastly, the Tribunal has been provided very little information about any sharing of the responsibility for housework. The submissions letter from the applicant's representative stated that the parties share the responsibility of housework including cooking, cleaning, doing laundry and so on. At hearing, the applicant said that before finding work after COVID-19 pandemic she would stay at home to do house chores. This information is not doubted by the Tribunal. However, it is not satisfied based on this information alone that the parties had arrangements that were and continue to be synonymous with a spousal relationship given that they are also parents to their two children who live with them.
32. The Tribunal finds that the nature of the parties' household does not indicate that they have been in a genuine and continuing relationship at the time of application or at the time of this decision.

Social aspects of the relationship

33. The Tribunal has been provided with photographs of the parties in various settings. Two photographs show the parties at their marriage ceremony in January 2017 although no other people appear in the photographs other than the celebrant. No other information was provided about who attended the ceremony, although it is noted that [Mr D] and [Ms E] were listed as witnesses. Neither of these witnesses provided any information.
34. Other photographs provided at the Tribunal stage show the parties with several third parties, although many depict the parties with their children and those children's partners in their

house or at restaurants. Several of these photographs are either identical to photographs provided at the Department stage or were taken on the same occasion as those earlier photographs. A photograph shows the applicant at a shopping centre with people who are described as the sponsor's parents. A series of 47 photographs was taken of the parties during a holiday to Vietnam that they took with their children, and movement records show that this holiday took place in or before August/September 2016 based on the parties' movement records. Some of these photographs show the parties with members of their families according to the accompanying annotations. Other photographs are not annotated and so the Tribunal has been unable to identify other third parties and their relationship with the parties.

35. In his submissions letter of 8 April 2023, the applicant's representative asserted that these photographs show that the parties have presented themselves before their families and friends as being a married couple. While the Tribunal accepts that the parties have shown themselves to their families, it is not satisfied based on the photographs alone that they have done so with the understanding that they are members of a spousal couple. Firstly, the photographs taken in Australia are largely confined to the parties and their family members, and no other third parties have been identified. Secondly, the holiday to Vietnam the subject of the photographs occurred before the parties were (re-)married, and their two children were also present, suggesting that this holiday may have been more in the way of a family reunion where the applicant had the chance to see her Australian-based children, rather than a chance for the sponsor and the applicant to meet each other and show themselves as a couple to their family and friends. Again, it is noted that no third parties outside of the parties' families and relatives were identified in these photographs.
36. Based on this information, the Tribunal finds that while the parties have been seen together in the presence of family and some unidentified third parties, it is not satisfied without more information that they have done so as members of a married relationship. This aspect is given little weight.
37. In terms of the opinion of the parties' friends and acquaintances about their relationship, the Tribunal has received two Form 888 statutory declarations dated 7 April 2023 – one from the parties' younger son, [Mr B], and that son's ex-girlfriend, [Ms F]. [Mr B] wrote that he believed the parties' relationship to be genuine by the way that they take care of each other – the applicant by cooking for the family; the sponsor by taking care of housework. He wrote that the sponsor had been having a hard time because of his medical conditions and the applicant had been taking care of him and working to support the family. He wrote that the parties still loved each other by the way that the sponsor tried to help the applicant as much as he could.
38. [Ms F] wrote that she met the parties in 2017 when she came to their house as [Mr B]'s girlfriend. She attested to her strong belief in the genuineness of the relationship based on witnessing the parties perform tasks for the family. She wrote that the applicant had been taking care of and supporting the sponsor, and that they still loved each other despite the difficult and stressful situation.
39. In his submissions letter of 8 April 2023, the applicant's representation submitted that "apparently" the parties' marriage has strong support and recognition from their two children.
40. The Tribunal has considered the information in front of it regarding the opinions of the parties' friends and acquaintances. It notes the contents of the two declarations and the fact that [Mr B] and [Ms F] regard the parties, along with their two sons, as a family. It accords some weight to these declarations as a result. It also accords some weight to the submission given by the applicant's representative although it notes that the parties' other son did not provide a declaration that would support the claim.

41. However, there is no information that shows the opinions of other third parties and especially those people outside of the parties' families about their relationship. In the absence of such information or a reason for this information not being available, the Tribunal finds that the parties are recognised by only a very small number of people as being married to each other. This aspect is given very little weight.
42. The Tribunal has lastly considered the basis upon which the parties plan and undertake joint social activities. It accepts based on the photographs provided that the parties have engaged in some social activities together, mainly comprising meals at restaurants with their sons and those sons' partners. It also accepts that they had a holiday together during which time photographs show that they attended at least one formal celebration although the precise nature of this celebration was not identified. This aspect is given some weight.
43. The Tribunal has considered the social aspects of the relationship and finds that they do not point to the parties being in a genuine and continuing relationship at the time of application or at the time of this decision.

Nature of the parties' commitment to each other

44. The Tribunal has considered information about the duration of the parties' relationship. In this regard, the parties have provided very little information about the development of their relationship, albeit its iteration. This is significant as the delegate made a similar finding in the delegate's decision – namely that the parties had provided little detailed information regarding the development of their relationship, including limited evidence to support the claims made in their application form. In this way, the parties have been on notice for more-than-four years that this lack of information was an issue in the review. Despite this, no additional written information has been provided by the parties themselves. Moreover, while the submissions letter dated 8 April 2023 from the applicant's representative provided a background of the relationship, this was largely a recapitulation of the claims made in the application form – namely, that the sponsor felt sad and lonely after his divorce to his ex-spouse and travelled to Vietnam to visit the applicant, during which time they realised they still had feelings for each other. As in the case of the claims made by the applicant in the application form, no specific dates were given for the events that the parties claim took place as part of the development of their relationship.
45. The result is that the Tribunal has very little information that speaks to the development of the parties' relationship beyond the vague claims made by the applicant in the application form. Importantly, there is no documentary evidence that would substantiate these claims, such as communications records which might be expected where, as here, the applicant claims that the parties stayed in contact while living in separate countries. Again, as above, the parties have been on notice of this lack of detailed evidence being an issue for the delegate in the delegate's decision and therefore an issue in the current review.
46. Based on the information and the findings above, the Tribunal is not satisfied that the parties' relationship (or at least its second iteration) developed as claimed by them. This aspect is given very little weight.
47. In terms of the length of time during which the parties have been living together, the Tribunal has earlier accepted that they have been living under the same roof with their children and their daughter-in-law. However, as has been found above, it is not satisfied that they have been living in this way as members of a married relationship. Therefore, the fact that the parties have most likely been living together since the applicant arrived in Australia in December 2016 is given very little weight.

48. The Tribunal turns to the degree of companionship and emotional support that the parties draw from each other and whether they see their relationship as a long-term one. The Tribunal firstly notes with much concern that the parties have not provided any written information that speaks to the companionship and emotional support that they draw from each other aside from the claims made by the applicant in her application form in January 2017 which are vague and lacking in detail.
49. At hearing, the Tribunal put to the parties that there is a pre-existing relationship between the applicant and her two children and that there were reasons for the applicant to live in Australia that did not have to do with having a commitment to the sponsor. The applicant said that, since she had been living in Vietnam, they felt like they needed each other and that was why she came back to the sponsor. She said that since reuniting with each other they realised the reason why they were coming back to one another. She said that her purpose was very simple – she wanted to reunite her family. She said that, since the sponsor got sick with hepatitis B, high blood pressure and gout, she committed totally to taking care of him and not thinking about anyone else. She said that the sponsor really needs care from her and the parties' youngest son (the oldest son went to Vietnam). She said that he has dialysis daily from 9pm until 5am and cannot go to the toilet.
50. The sponsor told it that he would do anything for his children's future. When it was put to him that the visa was concerned with him and the applicant and whether they had a mutual commitment, he said that the applicant has changed the way of her thinking. When asked what that meant, he replied that the applicant only thinks about the future with him.
51. The Tribunal has considered the information in front of it including the above information. In doing so, it accepts information from a letter from [a health service provider] dated 6 January 2023 that confirms that the sponsor has end-stage kidney failure and was scheduled to begin peritoneal dialysis soon.
52. Based on the information, the Tribunal accepts that the applicant provides some care to the sponsor who is suffering from a serious medical condition. However, and as difficult a decision as this is given the sponsor's condition, it is not satisfied based on evidence of this care alone that the parties have the requisite mutual commitment to each other. The sponsor's comment to the Tribunal at hearing – that he would do anything for his children's future – is more-than-understandable in the circumstances. However, it does not by itself reveal a commitment towards the applicant or towards their relationship as spouses. In terms of the applicant, while it accepts that she might feel a duty to look after the sponsor given his condition, it is not satisfied based on the dearth of information that she is rendering this duty as part of a relationship where both parties have a mutual commitment to a shared life together.
53. Having found in this way, the Tribunal is not satisfied that the parties draw a degree of companionship and emotional support that is commensurate with a married relationship. It is not satisfied that they see their relationship as a long-term one.

Other matters

54. At the conclusion of the hearing, and in response to the Tribunal's suggestion that the applicant may be motivated to come to Australia because of her two children, the applicant's representative put forward an oral submission that another pathway open to the applicant to come here in order to be reunited with her children was by applying for a parent visa. Although this was certainly an option for her, it remains the case that parent visas are extremely expensive. This submission is given very little weight as a result,

CONCLUSION

55. The task of assessing whether the applicant has been the spouse of the sponsor at the relevant times involves weighing the evidence in front of the Tribunal before balancing that evidence against itself. While there is some evidence that the parties have been living under the same roof, and that the applicant has been helping the sponsor with his serious medical condition, this must be weighed against other evidence, such as a lack of evidence of the parties representing themselves beyond a small group of people, little evidence of them integrating their finances and little evidence of them drawing a degree of companionship and emotional support from each other, including no written information from the parties themselves other than the applicant's claims in the application form in January 2017.
56. Moreover, and as alluded to throughout, the information must be assessed in the context of the parties having a shared interest in their two children, both of whom are Australian citizens and both of whom have been living at home with the parties (the younger one still living there). While it is settled that an applicant may enter into a marriage with a view to material benefit or advancement, and specifically a pathway to permanent residence,¹ the Tribunal is not satisfied that the parties' marriage (at least in its second iteration) has been genuine and continuing or that the parties have had a mutual commitment to a shared life as a married couple to the exclusion of all others.
57. Having taken into account the matters set out in r.1.15(3) in relation to the definition of spouse under s.5F(1), and based on the above findings, the Tribunal is not satisfied that at the time of the visa application and at the time of this decision the parties have had a mutual commitment to a shared life together as a married couple to the exclusion of all others or that their relationship has been genuine and continuing.
58. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2)(b) or s.5F(2)(c) are met at the time the visa application was made or at the time of this decision.
59. Therefore, the applicant does not meet cl.820.211(2)(a) or cl.820.221.

DECISION

60. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

David Crawshay
Member

¹Re MILGEA v Dhillon [1990] FCA 144, [11].

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).